IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-1628

Supreme Court, U. S.
FILED
JUL 5 1973
MICHAEL RODAK, JR., CLERK

TELEPROMPTER CORPORATION and
CONLEY ELECTRONICS CORPORATION,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., CALVADA PRODUCTIONS, A JOINT VENTURE, JACK CHERTOK TELEVISION, INC. AND DENA PICTURES INCORPORATED,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION NO. 72-1628

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 476 F. 2d 338 (2d Cir., 1973). It is also appended to the Conditional Cross-Petition for a Writ of Certiorari filed in No. 72-1633 by Columbia Broadcasting Systems, Inc., Calvada Productions, a joint venture, Jack Chertok Television, Inc.,

and Dena Pictures, Incorporated (hereinafter "plaintiffs") at Appendix A pp. 1a-28a.*

The opinion of the United States District Court for the Southern District of New York is reported at 355 F. Supp. 618 (S. D. N. Y., 1972) and is appended to the Conditional Cross-Petition at Appendix B pp. 1b-26b.

QUESTION PRESENTED

The only question really presented by the Petition for Certiorari is:

> Do petitioners' cable television stations which: (1) deliberately select for importation various television signals in markets distant from and alien to the cable communities in which they operate and (2) procure and import these distant signals into their operating markets and (3) transmit these signals over their cable stations, "perform" the copyrighted programs embodied in such signals under Sections 1(c) and (d) of the Copyright Act of 1909, 17 U. S. C. §§ 1(c) and (d)?

Petitioners Teleprompter Corporation and Conley Electronics Corporation (hereinafter "Teleprompter") set forth three further questions as issues in their petition. None of these bears any relation to the opinion of the Court of Appeals below or to the issues posed by this case. *See infra* at 14-27.

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*Reference is made in this brief to the opinions as printed in the Conditional Cross-Petition in No. 72-1633 (hereinafter cited as "Cross-Pet.") and not to those printed in the Petition in the present docket No. 72-1628 (hereinafter cited as "Pet.") because petitioners in the present docket inadvertently printed the unofficial opinion of the Court of Appeals below which contained factual errors later corrected in the official version released by the Second Circuit. The corrected version was printed in the Conditional Cross-Petition.

References to the record below as certified by the clerk of the Second Circuit are denominated "J.A." for the Joint Appendix volume and "J.A.E-" for the Joint Exhibit Volume.

STATUTE INVOLVED

The only statutory provisions involved are Sections 1(c) and (d) of the Copyright Act of 1909, 17 U. S. C. §§ 1(c) and (d), which are set forth in plaintiffs' Conditional Cross-Petition for a Writ of Certiorari, No. 72-1633, at 3-4.

STATEMENT

Teleprompter is the nation's largest operator of cable television stations. At the time of trial, it owned and operated some 100 cable television stations throughout the country with more than 500,000 paying subscribers. Its stations presently serve some 780,000 subscribers (Cross-Pet. at 4).*

As established by stipulations below, Teleprompter's cable television stations performed a number of functions the copyright implications of which were never previously before the courts. These included origination and transmission of substantial programming, sale and transmission of advertising, interconnection with other cable television stations. The stipulations also established that the Teleprompter stations selected, imported, and retransmitted programs broadcast in the first instance by television stations in markets far distant from the communities in which Teleprompter's cable television stations operate. These functions were in addition to a reception service which enhanced the ability of subscribers to receive signals broadcast by television stations in local and adjacent markets, a function that was held by this Court in *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U. S. 390 (1968) (hereinafter *"Fortnightly"*), not to be an infringing per-

*Plaintiffs refer the Court to its Conditional Cross-Petition in No. 72-1633 for a full statement of plaintiffs' activities, Teleprompter's non-distant signal importation activities and the procedural context in which the action herein was commenced and tried.

formance of the copyrighted programs (Cross-Pet. App. A at 5a-10a, 15a, 16; App. B at 6b-13b).

Issues were raised below with respect to all of the novel services provided by Teleprompter (Cross-Pet. at 2-9). Teleprompter, however, is challenging the Second Circuit's decision with respect only to the copyright effects of distant signal importation.*

Plaintiffs contended below and knowledgeable witnesses testified without contradiction that the activities of the Teleprompter cable television stations in selecting and importing distant signals for retransmission to subscribers were functionally equivalent to the activities of network affiliate stations in importing network signals originated in distant markets (J. A. 298a-299a, 373a-374a, 387a-388a, 399a-400a). Accordingly, it was urged that the Teleprompter cable station could not consistently with the test laid down by this Court in *Fortnightly* be deemed to fall "on the viewer's side of the line" for purposes of copyright liability. 392 U. S. at 396-399.

The Court of Appeals held that the Teleprompter cable television stations did infringe the copyrights of those programs carried on signals which they selected, imported and distributed from distant broadcast stations. Many of these were located hundreds of miles from the communities in which the cable stations operated and were clearly beyond the service areas of the broadcast stations originating the programs. The Second Circuit held that, to the extent cable television stations import such "distant" signals, they are "functionally equivalent to a broadcaster and thus should be deemed to 'perform' the programming distributed

*Plaintiffs are challenging the holding of the Court of Appeals with respect to certain of the other services provided by Teleprompter and have presented the relevant issues and considerations to this Court in their Conditional Cross-Petition for a Writ Certiorari, No. 72-1633.

to subscribers on these imported signals" within the meaning of *Fortnightly* and the Copyright Act (Cross-Pet. App. A at 18a).

The court below reached this conclusion with respect to importation of distant signals in light of a number of factors. Foremost was the fact that importation and transmission of distant signals was not present in *Fortnightly* and that this Court in *United States* v. *Southwestern Cable Co.*, 392 U. S. 157, 163-164 (1968), had found that distant signal importation was a function vastly different than mere enhancement of local television reception (Cross-Pet. App. A at 17a-19a). *See infra* at 9-12.

Further, the court recognized that television stations have limited effective broadcasting ranges owing to the fact that television waves travel in straight lines, while the earth's surface is curved. This range, as the result of certain FCC restrictions on power and tower height, except in unusual circumstances, is only 60-90 miles (J. A. 317a-318a, 374a, 492a-493a).*

Traditionally only these local signals have been available to television viewers in any particular community. Copyright owners are aware of this fact and license their programs accordingly. The record clearly shows that they do not intend that the programs they license for broadcast in one market be distributed in another distant market without authorization, and this for sound economic reasons (Cross-Pet. App. A at 3a, n. 2; J. A. 311a, 421a-422a, 434a-435a, 443a-444a). The decision of the court below appears to recognize the economic reality that a copyright owner's ability successfully to market his creation may depend on the revenue to be derived from syndicating the performance of his creation in areas that did not receive it in the first instance. Diminution of the copyright owner's

*Teleprompter's engineering expert was among those supporting this fact (J. A. 492a-493a).

reward, by permitting cable television stations freely to import and transmit distant signals without payment to the copyright owners, would violate the purpose of the copyright laws to stimulate creative effort through rewards to creators. *See infra* at 19-20.

Teleprompter cable television stations' activities in importing distant signals were at the time of trial as follows:

A. Farmington, New Mexico

Teleprompter's Farmington cable television station was importing from Los Angeles, some 600 miles away, the programs of four independent television stations. Teleprompter deliberately chose to import the signals of these stations because of the type of programming they had to offer (J. A. 568a-570a, *cf.* J. A. 612a). In selecting these signals, Teleprompter chose from a virtually unlimited number of stations. Indeed, in going to Los Angeles for desirable programming it bypassed some 113 other stations no farther from or nearer to Farmington.* Having chosen to import the programming of the Los Angeles stations, Teleprompter arranged to intercept their signals near Los Angeles and to retransmit them to Farmington by a complex 21-hop, 1,300 mile microwave system. These programs were otherwise not receivable in Farmington because of the distances involved (Cross-Pet. App. A at 7a, 24a-25a; App. B at 10b-11b; J. A. 117a, 269a-271a).**

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*The figures here and *infra* at 7-8 concerning the number of stations bypassed by Teleprompter in choosing the stations to import are based on listings in *Television Factbook*, vol. 41 (1971-72), a standard industry guide.

**The other signal that the court below found to have been imported into Farmington originated in Durango, Colorado, 43 miles from Farmington. Its reception in Farmington without microwave importation by Teleprompter was impossible because of a mountain wall. Teleprompter chose to retransmit only particular segments of this station's broadcast schedule so as to fit them more neatly into the program format it desired to present to its subscription-paying audience (Cross-Pet. App. A at 7a, 26a-27a; App. B at 11b; J. A. 187a-188a).

B. Great Falls, Montana

Teleprompter's Great Falls System was importing the programming of seven distant television stations located all over the northwest quadrant of the United States and Canada. Signals were imported from Salt Lake City, 466 miles away, Spokane, Washington, 286 miles away, Lethbridge, Canada, 163 miles away, and Helena, Montana, 71 miles away.* The cable station also carried the signals of two local television stations (Cross-Pet. App. A at 9a). The stations whose signals were imported were deliberately selected in consideration of the type of programming they offered, the times at which particular programs were broadcast and the program arrangement of the stations (J. A. 568a-570a). Only nine of the 52 television stations in the area, not counting Canadian stations, were selected. One of the imported stations was retransmitted on only a part-time basis to accommodate the programming needs of the cable television station (J. A. 221a). All of the distant signals were picked up off-the-air at various points near the originating stations and transmitted by microwave to a point in Great Falls whence they were distributed to subscribers. None of the signals imported was available to Great Falls viewers by any means other than the Teleprompter cable station (Cross-Pet. App. A at 9a).

C. Rawlins, Wyoming

Teleprompter's Rawlins cable television station was importing and retransmitting the programs of five Denver

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*Though Great Falls was 71 miles from KBLL-TV, Helena, and within what might be considered the normal range of a broadcast station, reception of KBLL's signals directly off-the-air in Great Falls was impossible and no person not a subscriber to the Teleprompter cable station was able to receive its signals (J. A. 219a-220a). KBLL-TV's signals were imported by Teleprompter into Great Falls by a 3-hop microwave system 135 miles long (J. A. 255a).

television stations, 184 miles away.* Direct reception of these stations was impossible in Rawlins because of the distances involved (Cross-Pet. App. A at 8a). Two stations far closer than Denver were bypassed by Teleprompter.

THERE ARE NO VALID REASONS FOR GRANTING THE WRIT OF CERTIORARI

Petitioners seek to justify the granting of a Writ of Certiorari in part on the ground that the plaintiff "CBS has frankly stated that it seeks a '. . . determination of the issue of copyright liability' " (Pet. at 6), a result which plaintiffs firmly believe was achieved by the unanimous decision of the Court of Appeals for the Second Circuit. Teleprompter does not mention in its petition its own strong efforts to prevent such a judicial determination below. Teleprompter in fact argued vigorously, both before the District Court and the Court of Appeals, that the matters at issue in this case should be left for resolution to Congress and the Federal Communications Commission.**

*The Rawlins cable station also retransmitted the programming of the Casper, Wyoming station, 87 miles distant, direct off-the-air reception of which was not feasible in Rawlins. This station's broadcasts, however, were available to Rawlins viewers by means of a translator, licensed by copyright owners, operating in the area and so were not considered by the court below as imported distant broadcasts and performed by Teleprompter (App. A 8a, see 26a). This same conclusion was reached by the court below with respect to the Albuquerque signals which, though they originated some 144 miles from Farmington and were microwaved some 30 miles into Farmington by Teleprompter, were not considered distant because they were also available in Farmington by means of a licensed translator service (Cross-Pet. App. A at 25a-26a).

**If this Court should choose to grant Teleprompter's petition, then we respectfully urge that the Court also grant the Conditional Cross-Petition for Certiorari because that cross-petition presents the other facts necessary to any further judicial resolution of the issues of present copyright liability of cable television stations.

I.

THE HOLDING OF THE COURT OF APPEALS BELOW WITH RESPECT TO DISTANT SIGNALS IS FULLY IN ACCORD WITH THE RULE SET FORTH BY THIS COURT IN *FORTNIGHTLY*.

Teleprompter's primary argument in support of its petition is that the decision of the Court of Appeals below, holding importation and distribution of distant signals a performance under the Copyright Act of 1909, is in direct conflict with this Court's holding in *Fortnightly* (Pet. at 24, 29-34). It is quite clear, however, that not only is the Court of Appeals' holding not in any conflict with *Fortnightly*, but is actually necessitated by *Fortnightly*.

This Court in *Fortnightly* held that a CATV system which "no more than *enhances* the viewer's capacity to receive the broadcaster's signals" "falls on the viewer's side of the line" and does not "perform" the programs embodied by the signals enhanced. 392 U. S. at 399 (emphasis added). The Court found that the particular CATV systems before it in *Fortnightly* were thus non-performers, on the "viewer's side of the line."

Fortnightly involved two small CATV systems consisting essentially of receiving antennas and cable which connected the antennas to the subscribers. Each of the systems carried only the programs of five television stations located in communities adjacent to the cable communities. The distances between the cities from which the broadcast signals originated and the two cable communities varied between 52 and 82 miles, within the normal physical range of the signals. 392 U. S. at 392. *See supra* at 5.* If it had

*Counsel for Fortnightly (Teleprompter's counsel here) advised this Court in *Fortnightly* that: "While respondent and some *amici* raise the dread specter of CATV systems carrying signals from New York to Los Angeles . . ., microwave is not involved in this case . . .; the systems before this Court are within or near the Grade B contour and *in the service area of the stations whose signals are made available to subscribers.*" Petitioner's Reply Brief, dated March 5, 1968, pp. 1-3 (emphasis added).

not been for the hilly terrain in and around the cable communities, these signals could easily have been received by all residents in the community. 392 U. S. at 391; *see United Artists Television, Inc.* v. *Fortnightly Corp.* 337 F. 2d 872, 875 (2d Cir., 1967). Indeed, some residents actually did receive the signals in question directly off-the-air; others received them by means of suitably located cooperative antennas. 392 U. S. at 391-2; 377 F. 2d at 883-4 n. 14.

To provide satisfactory reception of these nearby signals, Fortnightly erected antennas on hilltops two and one-half miles from the centers of each of the two towns. These antennas picked up the broadcasts involved directly off-the-air. They were then distributed by cable to the subscribers. *Id.* at 874-5. The two systems provided nothing more than a "well-located antenna with an efficient connection to the viewer's television set." 392 U. S. at 399.

Before arriving at its decision with respect to the copyright liability of the particular CATV systems before it, however, the Court in *Fortnightly* established a test for copyright liability in "light of drastic technological change" that had occurred since the enactment of the Copyright Act in 1909. *Id.* at 395-6. The test was based on analogy to broadcasters and other traditional performers. The Court stated that the resolution of the issue of whether or not cable television systems "performed" depended "upon a determination of the function that CATV plays in the total process of television broadcasting and reception," *id.* at 397: where a CATV considered "in this framework . . . falls on the viewer's side of the line" it does not "perform." *Id.* at 399. The distinction rests upon a determination of whether the cable system is more akin to an "active performer" or to a "passive beneficiary." *Ibid.*

A "broadcaster" according to this Court in *Fortnightly*: (i) "selects and procures the program to be viewed, [which he] may produce . . . himself, whether 'live' or with film or

tape, or he may obtain . . . from a network or some other source"; (ii) converts the images and sounds into electronic signals and transmits them to the public, unless of course "the broadcaster obtains his program from a network [in which case] he receives the electronic signals directly or by means of telephone lines or microwave." *Id.* at 397; *see id.* at 400. Viewers, on the other hand, merely "receive the broadcaster's signals." *Id.* at 401. A "broadcaster" is also engaged in the business of selling its time and facilities to sponsors and is concerned with program content and arrangement. *Id.* at 400 n. 28.

Applying this test to the Fortnightly CATVs described above, the Court found that their activities were merely reception services, that they were "passive beneficiaries" falling on the "viewer's side of the line." *Id.* at 399. But this Court made very clear that it was "necessarily" speaking "with reference to the facts of this [*Fortnightly*] case." *Id.* at n. 25. The Court of Appeals below acknowledged this and only began its analysis of the Teleprompter cable television stations from this point (Cross-Pet. App. A 11a-12a).

The court below correctly recognized (Cross-Pet. App. A at 17a-18a) that the question of importation of distant signals was not before this Court in *Fortnightly, see supra* at 9n., and that in *United States* v. *Southwestern Cable Co.*, 392 U. S. 157 (1968),* this Court found that:

> "CATV systems perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations

**Southwestern* was the companion case of *Fortnightly* and was referred to by *Fortnightly* "for a discussion of CATV systems generally," 392 U. S. at 391 n. 1.

entirely beyond the range of local antennae." 392 U. S. at 163 (footnote omitted).*

It was in light of this Court's explicit recognition that the importation of programming from distant stations is a function totally different from that of the Fortnightly systems that the Second Circuit approached the question of the copyright implications of Teleprompter's activities and applied the *Fortnightly* test to those activities.

In importing the programming of distant television stations, the Teleprompter cable television stations performed all of the functions enumerated as indicia of *broadcasters* by this Court in *Fortnightly*. They selected the programming to be imported. They procured the programming. They thus concerned themselves with the program content. *See supra* at 6-8.** In so doing they acted in precisely the same role as a broadcast network affiliated station which imports and distributes network program-

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*Teleprompter, while admitting that *Fortnightly* must be read in light of *Southwestern*, inconsistently argues that in *Southwestern* this Court made its comments on "distant stations" hinge on a footnote reference to the changing FCC definition of "distant signals" (Pet. at 30-31). This Court's footnote to what at that time was the FCC's "distant signal" definition quite obviously was not an adoption of that definition for copyright purposes.

Although Teleprompter counsel here contend that signals received by the Fortnightly systems were "distant" under the then current definition of the FCC, as counsel for Fortnightly, they advised this Court that "distant" signals were not there involved. *See supra* at 9n. Furthermore, under the current FCC definition as set forth in *Cable Television Report and Order*, 36 FCC 2d 143 at ¶¶ 81-85 (1972) and implemented by 47 CFR § 76.54(a), *all* the signals received by the Fortnightly systems were local with respect to those systems, *see* Appendix B to *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 378, 460 (1972), while the signals found by the Second Circuit below to be "distant" with respect to the Teleprompter stations are also "distant" by current FCC definition, *see id.* at 422, 428, 463.

**As noted *supra* at 3 and as discussed more fully in the Cross-Petition at 6, 15-16, Teleprompter also sold time to advertisers. The record clearly indicates that the additional revenues from advertising would be used for distant signal importation as well as for origination of Teleprompter's own programming (J. A. E-54-55).

ming that is originated in distant broadcasting centers usually New York or Los Angeles. *See supra* at 4.

As a television broadcast station selects the network whose programs it desires to distribute and, thereafter, the network programs it desires to broadcast—so the Teleprompter cable station chooses the television broadcast stations and programs it desires to distribute. As the network affiliate station broadcasts the bulk of the program schedule offered by the network with which it has chosen to affiliate—so the Teleprompter cable station distributes the bulk of the program schedules of those stations it has chosen to procure. The very methods used by affiliated stations to import network signals—cable, microwave, direct off-the-air reception—are the methods used by the Teleprompter cable stations to import the programming of distant stations (J. A. 171a, 316a, 319a-320a, 388a; *cf.* 392 U. S. at 397).

On the basis of these facts, the Second Circuit found that in importing the programming of distant stations and distributing that programming to their subscribers the Teleprompter cable television stations were "functionally equivalent to a broadcaster" (Cross-Pet. App. A at 18a. *See also* J. A. 298a-299a, 373a-374a, 387a-388a, 399a-400a).

Having so found this to be the fact and faced with this Court's recognition in *Fortnightly* that broadcast affiliated stations which import programming from distant stations for simultaneous distribution "perform" within the meaning of the Copyright Act,* the Second Circuit held that the

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**Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U. S. at 398 n.23, *citing Select Theatres Corp.* v. *Ronzoni Macaroni Co.*, 59 U. S. P. Q. 288 (S. D. N. Y., 1943); *cf.* 392 U. S. at 397 n. 19.

Select Theatres held that one who had a signal embodying a copyrighted work " 'piped' to" him as that signal was being broadcast by a primary central station and who simultaneously retransmitted the work to a public not within reach of the primary signal was performing within the meaning of the Copyright Act. 59 U. S. P. Q. at 289 and 291.

(cont'd)

Teleprompter cable stations "perform" the distant programming they import and distribute (Cross-Pet. App. A at 18a). This Court's decision in *Fortnightly* gave it no alternative but to so hold. *See supra* at 10-11.

II.

TELEPROMPTER'S ANCILLARY ARGUMENTS DO NOT JUSTIFY GRANTING THE WRIT.

A. The Decision of the Court Below Is Consistent with the Communications Act and FCC Regulation of Cable Television.

Both Teleprompter and the National Cable Television Association, Inc. (filing as *amicus* in support of the petition, hereinafter "NCTA") forget that this case is a copyright case brought under the Copyright Act of 1909. They prefer to stress other matters. Accordingly, both clutter their petitions with detailed references to FCC rules and policies concerning the regulation of broadcasters and cable television operators, as well as to various policies and provisions of the Federal Communications Act of 1934. They urge that the unanimous decision of the court below conflicts with these policies and provisions and that this Court should grant certiorari so as to obviate this alleged conflict by declaring the Copyright Act inoperative (Pet. at 24-27, 35-38, 47-51; NCTA Brief at 7-12).

(cont'd.)

Teleprompter attempts to escape the implications of this case by some reference to the fact that the affiliated station there was a broadcaster and so responsible under some FCC policy statement for all material broadcast through its facilities even if originated elsewhere (Pet. at 10-11, 32-33). *Responsibility* under some FCC statement certainly has no relevance to *performance* under the Copyright Act, nor does it have any logical connection with the extent to which Teleprompter's operations in importing distant signals are *functionally equivalent* to the operations of a network affiliated station under the *Fortnightly* test. *See infra* at 15-17.

These references to the Communications Act and FCC regulations are totally misplaced. The issue is whether the Teleprompter cable stations "perform" plaintiffs' copyrighted works within the meaning of the Copyright Act. It is not whether the Teleprompter cable stations "broadcast" the copyrighted works within the meaning of the Communications Act or the rules promulgated by the FCC.

The rights of the copyright holders are based on the Copyright Act of 1909 enacted pursuant to Article 1, Section 8, clause 8 of the United States Constitution which grants Congress the power "to promote the progress of Science and the useful Arts, by securing for limited times to authors and inventors the exclusive right . . ." to their works. It was this Act of Congress and this Constitutional provision with which the Court of Appeals below was concerned. Other acts and agency policies were correctly ignored as irrelevant.

Teleprompter and the NCTA contend that the Communications Act and FCC policies and rules amend, limit, modify, supersede and make exceptions to the Copyright Act. Yet Section 414 of the Communications Act, 47 U. S. C. § 414, specifically provides that:

> "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."*

The FCC has never contended that its rulings or the provisions of the Communications Act can or should affect

*Basing its decision on Section 414, the Ninth Circuit in *Cable Vision, Inc.* v. *KUTV, Inc.*, 335 F. 2d 348, 349, 353 (9th Cir., 1964), *cert. denied*, 379 U. S. 989 (1965), held that Congress "had not preempted the adjustment of property rights in the communication field by passage of the Communications Act." *See FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940) ("The Communications Act is not designed as a new code for the adjustment of conflicting property rights through adjudication").

copyright obligations. On the contrary, the FCC has consistently stressed that it has never intended by its cable rules to "affect in any way the pending copyright suits, involving matters entirely beyond [the FCC's] jurisdiction." Indeed, the Commission has bluntly stated that its rules "affor[d] no defense . . . in a copyright suit." *Second Report and Order,* community Antenna Television Systems, 2 FCC 2d 725 at ¶ 108 (1966).

On February 2, 1972, the FCC adopted a *Cable Television Report and Order,* 36 FCC 2d 143, in which the Commission imposed certain "exclusivity rules" (47 C. F. R. 76.91-159, set out at 36 FCC 2d at 233-236) and limited the number of distant signals a cable station may import (47 C. F. R. 76.51-65, set out at 36 FCC 2d at 220-233) (*see* Pet. at 26, 37; NCTA Brief at 7-8). But as FCC Chairman Dean Burch explained in his concurring statement:

> ". . . one of the gut issues of the cable controversy [is] that cable remains an uneasy outsider with respect to the programming market. And only when its right to the use of its basic product is secure and regularized, only then will its future be unclouded. It is this issue that the Federal Communications Commission can neither resolve, nor avoid." 36 FCC 2d 143, 290 (1972).

"Copyright policy," as Chairman Burch told Congress in a letter dated August 5, 1971, "is most appropriately left to the Congress and the courts. . . . In short, we believe that the two matters—cable regulation and copyright—can be separately considered."

In any event, the decision below does not conflict with FCC regulatory policy with respect to the development of cable stations. No one seeks to stop the importation of distant signals by Teleprompter. The Second Circuit

simply stated that cable stations that imported programming from distant stations must, like any other user of copyrighted works, pay royalties for the use of those programs.* There is no need for this Court to review such an obvious conclusion.

B. The Decision of the Court Below Does Not Conflict with Industry Economics.

Teleprompter argues in support of its petition that the decision of the Court of Appeals below runs counter to industry economics (Pet. at 34-42). The court below readily saw the spurious nature of this argument and rejected it.

Teleprompter seeks to minimize the significance of its importation of programming into communities far distant from the market area of the originating television stations by relying on what it calls the "coverage area" of the television stations as purportedly described by the ARB and Nielsen television rating services and in station coverage maps prepared by sales representatives of various television

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*The NCTA at 10-12 of its Brief expresses concern that the application of the Copyright Act to require cable stations to obtain copyright clearance would frustrate objectives which the FCC hopes to accomplish by means of cable, objectives which the FCC has also attempted to implement by means of UHF broadcasting, translator, and satellite stations. All of these other means by which the FCC has attempted to implement the same policies are admittedly liable under the Copyright Act and do in fact obtain copyright licenses from copyright owners. There is certainly no reason why cable stations should be treated differently, even assuming the FCC had the power, which it clearly has not, to treat them differently.

When the shoe is on the other foot and NCTA feels cable television threatened by unequal treatment which puts cable television at a competitive disadvantage, it remembers the Copyright Act. It also demands that what it terms the "principle of equal competition" be applied to its competitors. Comments of the NCTA, In the Matter of *Various Methods of Transmitting Program Material to Hotels and Similar Locations*, FCC Dkt. No. 19671 at ¶ 12, see ¶¶ 2-4, 10 (May 21, 1973) (this docket concerns rulemaking relating to the impact of various methods of program distribution, not at present subject to FCC regulation, on broadcast and cable television).

stations (Pet. at 39-41). Teleprompter maintains that the descriptions in these materials of station "coverage areas" are significant because they are used in connection with the solicitation of advertising, the computation of rates to be paid affiliates, and the calculation of the cost-per-thousand of reaching television audiences. It implies that advertisers are aware of the cable stations' importation of programs, are willing to and do pay for the added coverage provided by cable importation, and this added payment redounds to the copyright owners in terms of added copyright fees.

The economic facts of the television industry upon which Teleprompter relies in propounding this argument are incorrect. The record quite clearly shows that these so-called "coverage area" maps are insignificant in selling advertising. They are not discussed in meetings between station representatives and advertising agencies. Advertising time is never bought and sold on the basis of such coverage maps. In dealings with advertising agencies who represent sponsors, no mention is ever made of the additional cable station coverage (J. A. 512a-513a).

Further, the supposed desires of advertisers are not useful in defining a "coverage area" of a station for copyright purposes. No advertiser appeared as a witness at trial. Many advertisers (*e.g.,* regional and local) have no interest whatsoever in the transmission of sponsored programs into distant markets (J. A. 515a-518a).* Nor do national advertisers place much, if any, value on duplicated coverage of commercials by cable stations which import the commercials and duplicate those carried by local stations. These facts were readily acknowledged by the court below which felt impelled to recognize them by both

*These facts of advertising life in the television industry were all testified to by defendants' own witness, James R. Theiss, a vice president and director of John Blair & Company, the largest of broadcast station representative companies (J. A. 508a).

"economics and common sense." (Cross-Pet. App. A at 3a, n. 2).

Importation of distant signals copyright-free by cable stations, rather than being of value to copyright owners and the television industry, is a grave threat to them. Due to physical and regulatory limitations, *see supra* at 5, the markets of television broadcast stations have traditionally been localized. This fact has long been recognized by the program suppliers, copyright holders and others involved in the production of television programs. It has been on the basis of this recognition that copyright owners, including plaintiffs, have negotiated for the license of their works and have actually licensed them.

At the time of the initial investment and commitment of funds in program production, no one knows whether a particular program will be attractive to advertisers or to the public. As a result, the license fees that copyright owners are able to receive from any network for initial transmission by all of the network's television stations throughout the country are limited. The risk of loss lies with the copyright owners (J. A. 314a).

Upon completion of a network "run", however, the copyright owners typically syndicate successful programs to individual television stations around the country for further broadcast in their respective local markets. These programs are syndicated several times up to the point where the programs no longer attract an audience and advertisers. For each separate syndicated broadcast in a particular television market, the copyright owner receives a license fee. It is from these fees that the copyright owners recoup their investment and make their profit (J. A. 311a, 313a, 423a-425a, 428a-429a, 432a-434a, 436a-437a; *see* J. A. 421a-425a). These same considerations apply to syndication to local cable stations for transmission over their local origination channels.

In light of this situation, copyright owners who license programs for broadcast in one particular market do not in-

tend that the programs be picked up by a Teleprompter cable station and retransmited to separate, distant markets (J. A. 311a, 421a-422a, 434a-435a, 443-444a). Indeed, such an intention on the part of the copyright holders would be self-destructive and would gravely jeopardize the economic value of their works.

License-free importation of a particular program by a cable station from one market into another and the distribution of the program in the second market would materially lessen the ability of the copyright owner to subsequently license his program for a "run" in that second market. And even if it were possible after a cable television distribution of the imported program to syndicate the program in the second market, the copyright owner would not be able to obtain as great a fee for it as he would if the program had never previously been shown in that market. A second "run" fee is smaller than a first "run" fee and, similarly, a third "run" fee is smaller than that of a second "run" (J. A. 311a, 434a-437a).

It was in light of these facts that this Court in *Southwestern* recognized that

> "Although CATV may in some circumstances make possible 'the realization of some of the [Commission's] most important goals,' *First Report and Order,* [38 FCC 683] at 699, its importation of distant signals into the service areas of local stations may also 'destroy or seriously degrade the service offered by a television broadcaster,' *id.*, at 700, and thus ultimately deprive the public of the various benefits of a system of local broadcasting stations." 392 U. S. at 175 (footnote omitted).

Similarly, in its *Notice of Proposed Rulemaking and Notice of Inquiry* in Dkt. No. 18397, 15 FCC 2d 417 (1968), the FCC expressed quite bluntly its concern about

the copyright-free importation of distant signals by cable television stations and the impact of this inherent "unfair competition" on broadcasters:

> ". . . because CATV presently stands outside the competitive TV program distribution market (paragraphs 132-133, *Second Report*), an anomalous and completely unfair situation is presented. . . . And, even more important, both the CATV system and the broadcast station are large scale operations competing for audience—yet the one pays for its product and the other without any payment, brings the same material into the community by simply importing the distant signals (para. 135, *Second Report*).
>
> "...The unfair competition ... will be a significant factor in the development or healthy maintenance of television broadcast service." *Id.* at ¶¶ 35-36.*

Teleprompter's "coverage area" argument, based on ARB and Nielsen "coverage area" maps and definitions, is a bootstrap argument. While it is true that ARB reports include in the "coverage area" of a particular television station those communities into which cable stations import its signal, it is only *after* the cable station starts importing the signal that the cable community is considered by ARB to be within the "coverage area."

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*When Teleprompter feels that it is being forced to compete on unfair terms it does not hesitate to assert its rights under the Copyright Act and demand equal treatment:

> "The cable operation should not . . . be placed at a disadvantage by being forced to compete with other parties who provide comparable services but do not accept the same regulatory responsibilities and burdens. *It is an elementary principle of equity that parties engaged in similar pursuits should compete on comparable terms.*"

Comments of Teleprompter Corporation, In the Matter of *Various Methods of Transmitting Program Material to Hotels and Similar Locations, et al.*, FCC Dkt. No. 19671 *et al.* at ¶¶ 16-17 (May 21, 1973 (emphasis added). *See supra* at 17 n.

Acceptance of Teleprompter's argument would lead to absurd results. For example, if Teleprompter brought New York television signals into the Tokyo area by communications satellite, Teleprompter's logic would require a holding that Tokyo was in the New York "coverage area" and was covered by a copyright license granting performance rights in the New York market simply because the *following* day ARB included Tokyo in the "coverage area" of the New York station.

Tokyo is not in the New York market any more than Farmington is in the Los Angeles market or Great Falls in the Salt Lake City market despite the choice and actions of a Teleprompter cable station, a choice that might change and actions that might cease at any time. These choices and actions are made by Teleprompter for the benefit of Teleprompter without the consent of the copyright owners and contrary to their intent. Certainly a copyright owner could not base any royalty negotiations on such a "coverage area" which might be enlarged or contracted at any time, without notice, at any cable station's whim.

Contrary to Teleprompter's arguments, the FCC has found that distinct localized markets do exist in the television industry. The Commission has even identified them in its distant signal importation regulations. 47 C. F. R. § 76.51 as set forth in *Cable Television Report and Order, supra*, 36 FCC 2d at 220-221. This fact in itself negates Teleprompter's "coverage area" argument.*

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*By this same token, the granting to a cable station of a microwave license to retransmit a certain broadcast station's signal is not an expansion of that television station's natural market (Pet. at 36). If such were the case, the position taken by the FCC in the *Cable Television Report and Order* would be meaningless. The microwave license (J. A. E-359-360) gives no indication that by it the FCC is expanding the "coverage area" of the broadcast stations carried or supplanting copyright licensing obligations. Indeed, as the Commission has indicated on a number of occasions, it has no authority to or intention of granting copyright licenses or affecting copyright rights. *See supra* at 15-16.

Indeed, any other approach by the Commission would have flown directly in the face of the Commission's "long standing allocations" and market identification policies which

> "... do not contemplate that a major television market should become to a significant extent, merely a satellite of another major market for television purposes, since that would thwart the local service concept of the Communications Act. (See Sections 307(b), 303(h); see legislative history of Section 303(s); *Second Report*, 2 FCC 2d at 770-771). As stated in the *Midwest* case (13 FCC 2d at 501), if such a result were deemed in the public interest, the Commission would follow the direct approach of granting increased height and power to stations in the largest communities and authorizing them to operate translator and satellite facilities in other sizable communities." *Notice of Proposed Rule Making and Notice of Inquiry*, 15 FCC 2d 417 at ¶ 34 (1968).*

It is quite clear that the Court of Appeals correctly understood the economics of the broadcasting and cable industries.

C. The Rule of the Court Below Does Not Threaten the Viability of Cable Television.

Both Teleprompter and the NCTA attempt to lead this Court into reviewing the decision below with all manner of dire predictions as to the effects of holding cable televi-

*It is irrelevant that some television stations may claim certain distant areas to be within their "coverage areas" or that rating services may show such data or that some advertisers may want wider coverage. Neither the stations nor the rating services nor the advertisers own the copyrights. The record clearly establishes that the copyright owners did not intend to grant copyright licenses to the cable stations for carriage of their programs to the distant markets. *Supra* at 5-6, 19-20.

sion stations amenable to the Copyright Act for the performance of programs they import from distant stations (Pet. at 27-28, 44; NCTA Brief at 2-8). They talk of potentially huge damage figures with resultant threats to the "very existence" of cable stations (NCTA Brief at 4). They harp on the lack of any "mechanism" by which cable television operators can negotiate with program suppliers for copyright licenses (Pet. at 28). They raise the specter of major television networks exercising their great powers to drive the cable television stations out of markets (Pet. at 27-28; NCTA Brief at 6-8). They charge that the effect of all this will be to deprive the public of access to cable television and its great benefits (Pet. at 3-4, 28; NCTA Brief at 11-12).

That the decision of the Court of Appeals sounds the death knell of cable television is ludicrous.* The decision below merely recognizes the obligation of cable television stations to compensate the owners of the copyrights of those programs on which they base their business. Neither CBS nor any of the other plaintiffs in this action is desirous of extracting unreasonable sums from the cable television industry. Indeed, Teleprompter concedes that CBS has made it clear that it is *not* seeking "large damages" (Pet. at 27).

Both Teleprompter's and the NCTA's purported fears are rooted in the erroneous assumption that the statutory damages of not less than $250 per infringement would

*On the contrary, it is interesting to note that following the rendering of the decision of the Court of Appeals both Teleprompter and the NCTA released to the press generally self-satisfied and congratulatory statements. Such terms as "particularly pleased" and "encouraging" were used. David Foster, the President of the NCTA, even said that "we are pleased that the courts have not permitted the copyright issue to interfere with the growth of the [cable] industry." This is hardly consistent with their present claim that they stand on the brink of catastrophe. *See Cable News*, March 12, 1973 at 6; *Broadcasting*, March 12, 1973 at 12; *CATV: Newsweekly of Cable Television*, March 19, 1973 at 7-8.

automatically be granted (Pet. at 44; NCTA Brief at 5). This Court, however, has made it clear that in copyright cases the courts have wide discretion among the remedies of actual damages, accounting and statutory damages, and that they are to be governed by the equities of the case and the policies of the Copyright Act. *Woolworth Co.* v. *Contemporary Arts,* 344 U. S. 228, 231-232, 234 (1952). One of the obviously relevant factors is the degree to which the copyright proprietor has actually been damaged, and this will vary greatly from case to case depending upon the particular facts. *See, e.g., Shapiro, Bernstein & Co., Inc.* v. *4636 S. Vermont Ave., Inc.,* 367 F. 2d 236 (9th Cir., 1966) (where *de minimis* damages shown, the court denied the granting of statutory damages); Cross-Pet. App. A at 27a (where the court below recognized that no more than *de minimis* damages might be involved in certain instances here). The Copyright Act was not designed to require that remorseless retribution be exacted in every case of infringement no matter what the circumstances. The history of copyright litigation illustrates the fact that copyright owners are not interested in destroying their prospective licensees.* In any event the issue of damages is not presently before this Court nor was it before the Court below. The issue was separated out from this first stage of this case by Pre-Trial Order No. 1 (J. A. 72a, 101a). The Court of Appeal's remand order specifically covered the damage issue. If Teleprompter should have any cause for dissatisfaction with the determination of that issue in future proceedings, its right to appeal from such determination and to seek review by this Court will be intact. At the present time, Teleprompter's "fears" are irrelevant and purely hypothetical.

*In light of the fears expressed by Teleprompter and the NCTA, it is interesting to note that in the over 20 years of CATV activity, only two suits have been brought by copyright owners, this case and *Fortnightly*.

Nor is there any substance to the claim that certiorari should be granted because there is no "mechanism" to negotiate for copyright licenses. Teleprompter never made any effort to negotiate such a license with the plaintiffs or any other copyright owner and acted on the assumption that it could enjoy perpetually the fruits of its misappropriation. The Court of Appeals has made it clear that the courts have not granted blanket copyright immunity to an entire industry. Once it is certain that this decision is final and no longer subject to review, a "mechanism" will be found.*

Finally, the specter of a great television network conspiracy to exclude cable television from the program market is totally irrelevant to the present action. This Court in *Fortnightly* was presented with similar arguments, but it refused to take them into consideration, holding that such considerations were for Congress and that the Court's job was to "take the Copyright Act of 1909 as we find it." 392 U. S. at 401-402.

Teleprompter raised these defenses in its answers to the several complaints (J. A. 37a-38a, 63a-65a, 96a). They are not, however, properly before the Court at the present time, having been specifically separated out by Pre-Trial Order No. 1 from the first stage of this action, the only stage which Teleprompter can now attempt to bring to the attention of this Court (J. A. 72a, 101a). Accordingly, we ask the Court to disregard them. In any event, there is certainly no indication on the record or elsewhere that any of Teleprompter's and the NCTA's dire predictions of

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*As Dr. Leland Johnson, an independent expert in the field, has found in *The Future of Cable Television*, at p. 17n. (Rand Corp. Report prepared for The Ford Foundation, 1970):

> "'The supposed difficulty of obtaining retransmission consent strikes me as nothing but a red herring. If cable were paying for retransmission, the owners of copyright would think of a way of selling the rights.'"

Indeed, the fact that such "mechanisms" do exist is clearly exemplified by the fact that every other class of copyright users has managed to deal successfully with the copyright proprietors.

exclusionary practices will come to pass. If such conduct ever does occur, the government or the aggrieved parties could quite properly find appropriate relief in the courts. Distorting the law as it presently exists to prevent possible future abuses is not justifiable.

D. The License Implied in Law Argument Has Been Repeatedly and Properly Rejected by the Courts.

Teleprompter tries once again to escape responsibility for its actions under a so-called "license implied in law" (Pet. at 51-53). This argument was twice explicitly rejected by the Second Circuit, once in *Fortnightly*, 377 F. 2d at 881-883 and again in the decision below (Cross-Pet. App. A at 23a, n.18).

Though this Court never explicitly reached the question of "license implied in law" in *Fortnightly*, 392 U. S. at 401 n.32, it implicitly did so. As Teleprompter acknowledged below and as the Court of Appeals rightly pointed out (Cross-Pet. App. A at 23a, n.18), the compromise proposed in *Fortnightly* by the Solicitor General was based on a "license implied in law." The compromise was rejected. This Court refused to distort the Copyright Act by accommodating it to allegedly conflicting policies of communications and antitrust. Rather, this Court insisted that such a job was for Congress and it merely took "the Copyright Act of 1909 as we find it." 392 U. S. at 401-402.

If a license for defendants' activities is to be implied here, then it must be implied under the Copyright Act. Nothing in the Copyright Act implies any such "license" or limitation on the rights granted. No cases support such a "license."*

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*The only authority defendants cite for its "license implied in law" is *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U. S. 476 (1964). This case is completely inapposite. It concerned an attempt by a patentee to limit the right of his licensee to use unpatented replacement parts by means of restrictions in a license to use the patented articles. *Id.* at 496-500.

Teleprompter attempts to recast this "license implied in law" argument as a "dedicated to the public" argument. Ignoring the active-passive dichotomy set down by this Court in *Fortnightly* and arguing that the public is entitled to receive and that Teleprompter as the chosen instrument of the public partakes of the public entitlement, Teleprompter maintains that once a copyright work is licensed to any broadcaster and once it is broadcast by any one broadcast station anywhere it must be *"intended"* for the public everywhere and in the public domain (Pet. at 43, 52). This "dedication to the public" theory, however, has been universally rejected by a long line of judicial precedents going back to the early days of the Copyright Act, a line which has been reaffirmed as recently as this Court's decision in *Fortnightly* where the copyright liability of network affiliates was restated. 392 U. S. at 398 n. 23. *See supra* at 10-11, 13.*

E. Teleprompter's Cavils about the Definition of "Distant Signals" Developed by the Court of Appeals Do Not Warrant the Granting of Its Petition.

Petitioners cavil with the copyright definition of a distant signal which was enunciated by the Court of Appeals

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**See, e.g., Ferris* v. *Frohman*, 223, U. S. 424, 435-436 (1912) (". . . the public performance of the play is not an abandonment of it to the public use."); *King* v. *Mister Maestro, Inc.*, 224 F. Supp. 101, 105-107 (S. D. N. Y., 1963); *Uproar Co.* v. *NBC*, 8 F. Supp. 348, 362 (D. Mass., 1934) (the broadcast of a script by radio "cannot be held to be . . . a dedication of it to the public at large."), *aff'd.*, 81 F. 2d 373 (1st Cir.), *cert. denied*, 298 U. S. 670 (1936); Nimmer, *Copyright Publication*, 56 Colum. L. Rev. 185, 194-195 (1956). This Court, per Mr. Justice Holmes, recognized in *Manners* v. *Morosco*, 252 U. S. 317, 325-326 (1919), the legitimacy of a copyright owner limiting the grant of a license to perform the work publicly, including limiting the performance to certain specific territories.

The law is clear that multiple broadcasts of a single program, though simultaneous, give rise to multiple performances within the meaning of the Copyright Act. For instance a network show broadcast by 100 affiliates is performed 100 times. *See Law* v. *National Broadcasting Co.*, 51 F. Supp. 798 (S. D. N. Y., 1943) (network broadcast on three occasions over 67, 66 and 85 stations give rise to 218 "performances"); *Davis* v. *E. I. DuPont de Nemours & Co.*, 249 F. Supp. 329 (S. D. N. Y., 1966); *Select Theatre Corp.* v. *Ronzoni Macaroni Co.*, 59 U. S. P. Q. 288 (S. D. N. Y., 1943) specifically approved by *Fortnightly*, 392 U. S. at 398 n. 23).

and then applied to the five illustrative systems before the court (Pet. at 44-47). These frivolous objections do not justify the granting of the writ. In fact, the Court of Appeals remanded the case to the District Court and petitioners were afforded the opportunity to present their technical objections on the District Court level (Cross-Pet. App. A at 27a-28a). This opportunity was ignored.

Whatever the precise definition of a "distant signal," the facts here are quite clear. Because of the nature of television signals and FCC regulation, the normal range of reception of a television station is limited to between 60 and 90 miles. *See supra* at 5. There is no way that that range can be extended without the active intervention of a retransmission entity as, for example, Teleprompter.

There is no dispute that the programs of the Los Angeles station could not have been received in Farmington, located 600 miles away. Those signals were "distant" by any definition.* Similarly, it is undisputed that the Denver stations were unavailable in Rawlins 184 miles away. Those signals were "distant" by any definition. Nor were the various signals imported into Great Falls from a number of cities up to 466 miles away received there other than by the active intervention of the Teleprompter cable television station. These signals also were "distant signals" by any definition. (*Supra* at 5, 11-12; Pet. at 23-24.)

*With respect to the Durango station, Teleprompter argues that Durango is "local" to Farmington because Farmington is within its Grade B contour and as such must be carried by the Farmington cable station (Pet. at 49-50). As shown *supra* at 15-16, even if such is the case it would be irrelevant to the "distance" question considered from a copyright standpoint. But in fact, the FCC no longer considers all Grade B signals local. *See Cable Television Report and Order*, 36 FCC 2d 143 at 173 and *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 348. In any event, petitioners themselves admit that the Court of Appeals left the question of Durango open on remand (Pet. at 49). Yet they quite consciously did not avail themselves of this opportunity to show the "local" status of the signal.

CONCLUSION

For the reasons set forth above, the petition in No. 72-1628 should be denied.

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July 5, 1973